No. 83-1290

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MOBIL OIL CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and VALDUS ADAMKUS, REGIONAL ADMINISTRATOR, REGION V, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN PETROLEUM INSTITUTE

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BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE

The American Petroleum Institute submits this brief as *amicus curiae* in support of the petition for a writ of certiorari in Number 83-1290.[1] The petition seeks review of the opinion of the United States Court of Appeals for the Seventh Circuit that the Environmental Protection Agency ("EPA") had the authority under Section 308 of the Clean Water Act, 33 U.S.C. § 1318 (1976 & Supp. V. 1981), to collect samples from the internal waste water streams at

[1]Both parties have consented in writing to the filing of this brief. Copies of the letters from counsel have been lodged with the Clerk.

the petitioner's petroleum refinery near Joliet, Illinois. *Amicus* believes that the Seventh Circuit misconstrued EPA's statutory authority under the Act and that the non-consensual collection of samples from petitioner's private property violated its constitutionally protected right to be free from unreasonable searches and seizures. In an era of pervasive governmental regulation of commercial enterprise, the question of what constitutional limits circumscribe the government's authority to enter upon private property gains added significance and, therefore, is deserving of plenary review by this Court.

INTEREST OF THE AMICUS CURIAE

The American Petroleum Institute ("API") is a national trade association with a membership of over 200 corporations and 6,000 individuals who are engaged in all aspects of the petroleum industry. Specifically, forty of API's member companies own or operate petroleum refineries and, therefore, are particularly interested in the outcome of this case. API regularly represents the petroleum industry in administrative rulemaking proceedings in the various state and federal agencies and in litigation in the state and federal courts. API shares the concern of petitioner, one of its members, that a fair and constitutionally supportable balance be struck between legitimate governmental regulation of industry and the integrity of private property.

ARGUMENT

This case involves a modern petroleum refinery located near Joliet, Illinois, owned and operated by the Mobil Oil Corporation. Waste waters discharged from the refinery are subject to federal and state regulation under the Clean

Water Act. The plant operates under a valid National Pollutant Discharge Elimination System (NPDES) permit issued by the State of Illinois. Mobil has willingly monitored its waste water discharges and has unhesitatingly permitted government inspectors to do the same. In 1982, for the first time, EPA sought, over Mobil's objection, to collect samples of the Joliet refinery's internal waste streams (i.e., waste waters that had not yet been treated in the plant's waste water treatment system). Armed with an inspection warrant which had been issued based upon two vague affidavits, EPA collected the samples it desired. In the courts below Mobil unsuccessfully challenged this involuntary inspection on the grounds that it exceeded EPA's statutory authority and that it constituted an unreasonable search and seizure under the Fourth Amendnent to the United States Constitution. In rejecting Mobil's contentions, the Seventh Circuit Court of Appeals glossed over Mobil's statutory arguments and employed a novel balancing test by determining that EPA's interest in collecting the samples outweighed Mobil's interest in preventing their collection.

1. ***The Seventh Circuit ignored established rules of statutory construction, and as a result, misconstrued an important federal statute which has applicability to virtually all American industry.***

The Seventh Circuit's ruling effectively removes the limitations in the Clean Water Act on the government's authority to intrude into commercial private property. In doing so, that court upset the balance struck by Congress between the legitimate public interest in pollution control and private property rights.

In determining the extent of EPA's authority to sample industrial waste water streams, one should look first to the

plain meaning of the applicable statute. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 73-74 (1980). The applicable statute here, Section 308(a) of the Clean Water Act, authorizes EPA to "sample any effluents which the owner or operator . . . is required to sample . . . ." In granting EPA authority to engage in sampling, Congress imposed express statutory limitations on the exercise of that authority: (1) only sampling of "effluents" is allowed; and (2) such sampling is allowed only to the extent that the owner or operator is required to sample the same effluents. Both these limitations were effectively ignored by the courts below.

The first statutory limitation requires one to consider whether internal waste streams constitute "effluents" within the intendment of Section 308. Although the term "effluents" is not defined in the Act, a definition may be constructed by using other, defined terms.[2] Indeed, in

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[2]Section 502(11) provides:

> The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

33 U.S.C. § 1362(11) (1976).

Section 502(14) provides:

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

33 U.S.C. § 1362(14) (Supp. V. 1981).

order to harmonize the term "effluents" with the statutorily defined terms "effluent limitations," "point source," and "discharge of a pollutant," it is necessary to consider "effluents" as materials discharged from a discrete and confined conveyance into the navigable waters of the United States. Since only treated waste waters are discharged, untreated internal waste streams are not "effluents" as that term is used in the Act. Thus, Section 308(a) is inapposite to the sampling at issue here.

Even if the term "effluents" could be read so broadly as to encompass internal streams (a reading *amicus* believes is unsupportable on its face or by resort to legislative history), EPA may only sample those effluents that the plant owner or operator is required to sample. Neither the Act, nor EPA's regulations,[3] nor the terms of the Illinois NPDES program, nor Mobil's NPDES permit require Mobil to sample internal waste streams. Indeed, the Joliet refinery's permit calls for sampling only "at a point representative of discharge."[4] There being no requirement for

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Section 502(12) provides:

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1362(12) (1976).

[3]EPA's regulations promulgated pursuant to Section 308(a) are found at 40 C.F.R., §§ 122.44(i), 122.45(i) (1983). The regulations call for monitoring of internal streams only in exceptional circumstances, not here applicable.

[4]EPA requested and obtained Mobil's permission to sample such discharge "effluents." This sampling is not and has not been at issue in these proceedings.

Mobil to sample its internal waste streams, EPA has no authority under Section 308 to sample these streams.

If one looks beyond the face of the statute to the legislative history, it becomes even clearer that Congress intended to restrict the government's sampling of industrial waste waters. While it is true that Congress demonstrated a desire that EPA be able to obtain sufficient information in order to carry out its mandate,[5] it is also true that Congress intended to limit the monitoring allowed to that which is necessary for the control of the discharge of pollutants.[6] Congress specifically declined to authorize the gathering of data per se.

Even if the above-cited express limitations on when EPA can engage in sampling could be ignored, the agency still would be required to articulate a basis for undertaking

[5]H.R. Rep. No. 911, 92nd Cong., 2d Sess. 113 (1972), *reprinted in* 1 The Environmental Policy Division of the Congressional Research Service of the Libarary of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 800 (1973).

[6]In its analysis of the legislation, the House Report stated:

> This section requires the owner or operator of any point source to monitor his own discharges accurately and to provide information to show whether or not he is in compliance with effluent limitations and other requirements under this Act.
>
> An indirect result of this requirement to provide valid data will be the expansion of EPA's and the States' data base for monitoring and planning. However, such monitoring is basically for control of the discharge of pollutants and not the gathering of data. The rights of the Administrator to inspect is limited to control of discharge of pollutants and not data gathering per se.

H.R. Rep. No. 911, 92nd Cong., 2d Sess. 114 (1972), *reprinted in* 1 The Environmental Policy Division of the Congressional Research Service of the Library of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 801 (1973).

its proposed actions. In its application for the inspection warrant at issue here, EPA cited two statutory purposes which would be advanced by granting its request: (1) it would allow EPA to determine permit compliance; and (2) it would enable EPA to determine whether additional pollutants should be limited in Mobil's next permit. Neither of these stated rationales, however, withstands analysis. First, EPA had previously found Mobil in compliance with the terms of its NPDES permit, without resort to the sampling of its untreated waste water.[7] Second, the development of additional effluent limitations for Mobil's permit was not a legitimate purpose. EPA must impose technology-based limitations by rule, *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 126-128 (1977), and not on a case-by-case basis, unless it retains the authority to issue NPDES permits, 33 U.S.C. §1342(a)(1) (1976). In this case, EPA had delegated the authority to issue NPDES permits to Illinois. Thus, EPA had no residual authority to impose additional limitations on the Joliet refinery.

As a federal regulatory agency, EPA can act only pursuant to its statutory authority. *Stark v. Wickard*, 321 U.S. 288, 309-310 (1944). Here, EPA exceeded its authority and, as a consequence, the sampling should never have been permitted. If allowed to stand, the Seventh Circuit's holding will allow EPA virtually limitless discretion in conducting inspections of plant sites. Thousands of industrial plants across the country may be affected. Beyond this, such a cavalier analysis of statutory authority may

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[7] In fact, Mobil's Joliet refinery has never been found to be in violation of any environmental law or regulation, and its wastewater treatment plant received an award from the State of Illinois for environmental excellence.

well be applied by the government to authorize inspections under provisions contained in other statutes administered by EPA,[8] as well as in any number of other federal regulatory statutes.

2. ***The decision of the Seventh Circuit improperly disregards the constitutional guidelines for administrative inspections set down by this Court in*** Barlow's ***and*** Camara.

The fundamental purpose of the Fourth Amendment's prohibition against unreasonable searches and seizures is "to safeguard the privacy and security of individuals against arbitrary invasions. . ." *Camara v. Municipal Court,* 387 U.S. 523, 528 (1967). The Fourth Amendment's protections apply to commercial as well as residential premises. *See v. City of Seattle,* 387 U.S. 541, 543 (1967). Except in "certain carefully defined classes of cases," warrantless searches or inspections are unreasonable and thus violative of the Fourth Amendment. *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 312-313 (1978).

Probable cause sufficient to support a warrant for an administrative inspection must be based either on "specific evidence of an existing violation," *Barlow's,* 436 U.S. at 320, or on a showing that " 'reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment.' " *Barlow's,* 436 U.S. at 320, quoting *Camara,* 387 U.S. at 538. An inspection warrant should not be a mere "rubber stamp" approval of executive action; rather, it should reflect the judgment of a neutral and detached magistrate that the proposed inspection is "reasonable under the con-

[8] *See* Resource Conservation and Recovery Act, 42 U.S.C. § 6927(a)(1) (Supp. V. 1981); Clean Air Act, 42 U.S.C. § 7414 (Supp. V 1981); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9604(e)(1)(B) (Supp. V 1981).

stitution, is authorized by statute, and *is pursuant to an administrative plan containing specific neutral criteria.*" *Barlow's,* 436 U.S. at 323. (emphasis added)

As discussed above, the inspection in this case was not authorized by statute. Even where warrantless administrative inspections have been upheld,[9] they were authorized by statute. Even the minimal Fourth Amendment protections in the form of statutory authorizations accorded to "pervasively regulated industries" were not afforded to the petitioner in this case. Thus, not only was the inspection *ultra vires,* but also it violated the Fourth Amendment. *See, Barlow's,* 436 U.S. at 323.

Even if the inspection here could fall within EPA's authority under section 308(a), the affidavits supporting the inspection warrant failed to meet the criteria for establishing probable cause set out in *Barlow's.* Although EPA acted pursuant to a warrant in this case, the warrant was so poorly supported that the difference between this case and cases where no warrants were obtained, *e.g., Barlow's, Camara,* and *See,* is one of form and not substance. If the warrants required in all but "certain carefully defined classes of cases," *Barlow's,* 436 U.S. at 312-313, are to have substance, then meaning must be given to this Court's requirement of "an administrative plan containing specific neutral criteria," *Barlow's,* 436 U.S. at 323.[10]

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[9] *See* Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) [industry had a long history of strict government regulation]; United States v. Biswell, 406 U.S. 311 (1972) [urgent governmental interests at stake; inspections were a crucial part of the regulatory scheme].

[10] There was no evidence that Mobil was suspected of a violation of law or regulation, so EPA officials sought to establish probable cause on the basis of an administrative plan.

This Court provided some guidance as to the meaning of this requirement in *Barlow's*. For one thing, a mere reference to the existence of an administrative plan in the supporting affidavit is insufficient. *Barlow's*, 436 U.S. at 323 n. 20. Nor is a mere statement that the proposed inspection is designed to assure compliance with a regulatory statute sufficient. *Barlow's*, 436 U.S. at 323 n. 20. The affidavit should: (1) demonstrate the criteria for selection of inspection sites contained within the plan; and (2) show how the site sought to be inspected fits within those criteria. *Barlow's*, 436 U.S. at 323 n. 20.

In the lower courts, an attempt has been made to give meaning to this requirement. In *Matter of Urick Property*, 472 F.Supp. 1193 (W.D. Pa. 1979), an administrative inspection warrant was sought based upon a supporting affidavit that described the development of two national inspection programs, stated that 300 foundries throughout the country had been selected for inspection, referred to a history of violations at the foundry in issue, and stated that the foundry in issue had not been inspected during the preceding year. Nonetheless, the court quashed the warrant because the government failed to articulate how that foundry differed from any number of other foundries. The First Circuit Court of Appeals applied a similarly exacting standard in *Donovan v. Wollaston Alloys, Inc.*, 695 F.2d 1 (1st Cir. 1982). There, the court upheld a warrant based on an affidavit that contained a five-page description of the administrative plan and an explanation that industries had been categorized by priority and that specific sites within the various categories were selected in alphabetical order.

In cases such as *Urick Property* and *Wollaston Alloys*, the rights of the industries involved were protected. Before warrants were issued, the government was required to pro-

vide sufficient detail about its inspection plans to warrant the conclusion that such plans really existed and that the sites sought to be inspected naturally fit within the plans' criteria. When the government meets such minimal requirements, plant owners are reassured that the inspections sought are not the product of arbitrary agency action. In the absence of the government's meeting such requirements, plant owners are in the same position they would be in if there were no warrant process at all.

Such was the case here. The affidavits submitted by EPA officials stated only that the proposed inspection was part of a "CSI-T" (Compliance Sampling Inspections for Toxicants) program; that the purposes of the program were to determine compliance with NPDES permits and to determine whether additional pollutants needed to be considered in future permits; and that the sampling of internal waste streams was necessary to achieve those purposes. As to the selection of Mobil's Joliet refinery for an inspection, the affidavits merely stated that the facility "was selected for a CSI-T as part of an ongoing administrative program to monitor facilities that have some potential for the discharge of toxic pollutants," and "pursuant to the continuing U.S. EPA program to monitor compliance with existing NPDES permit requirements." These alleged "programs" were described in no further detail. No information was provided about the scope of the programs, the planned frequency of inspections under the programs, or how particular sites were to be selected. No explanation was provided as to where Mobil's refinery might fit into EPA's list of priority plants, if any, *see Wollaston Alloys, supra,* or as to how Mobil's refinery differed from the thousands of other plants that operate under valid NPDES permits and that have "some potential for the discharge of toxic pollutants," *see Matter of Urick Property, supra.*

On the basis of such scant information, it would be impossible for a magistrate, the petitioner, or this Court, to be assured that petitioner's site was chosen for sampling on the basis of pre-established neutral criteria. The lower courts' refusal to quash the warrant permitted the magistrate to "rubber stamp" EPA's application, rather than carry out the task of substituting his independent judgment for that of agency officials.[11] The net effect was to make a mockery of the Fourth Amendment's warrant requirement. The issuance of a warrant on the basis of so little information as to make the warrant requirement meaningless is the very sort of arbitrary action against which the Fourth Amendment was designed to protect and which this Court has on so many prior occasions condemned.

Yet arbitrary action is not the only danger attached to warrants based on such vague information. *Amicus* reiterates that petitioner's refinery was a modern facility with an excellent environmental compliance record. At no place in the record is there even a suggestion that petitioner was suspected of violating the law. However, the ramifications of "rubber stamp" warrants at issue here could extend to other situations as well. For example, if the owners of a particular plant are suspected of criminal violations, the government could employ vaguely described "administrative plans" as a subterfuge for conducting what is truly a prosecutorial search.[12] Although most federal regulatory statutes are enforced through civil proceedings, nearly all contain criminal penalties for willful violations.[13] Thus, the potential for abusing the warrant

[11] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976).

[12] "'[I]f the authorities are seeking evidence to be used in a criminal prosecution, the usual standard [of probable cause] will apply.'" Michigan v. Tyler, 436 U.S. 499, 508 (1978), *quoting with approval the same case below*, 399 Mich. 564, 584 (1977).

[13] Including the CWA. 33 U.S.C. § 1319 (1976 & Supp. V. 1981).

process by subterfuge is widespread. Requiring the articulation of an administrative plan, including selection criteria, and a demonstration of how a particular site meets those criteria would significantly limit the potential for such abuse.

In sum, this Court should further define the requirements of administrative probable cause in order to assure that administrative inspection warrants constitute neither judicial endorsement of arbitrary governmental action nor convenient subterfuges for criminal investigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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